Submitted to Wilbur, Mathews and Stephens.

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No. 10,443

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. S. SWANK, *Appellant,* vs. J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, WILLIAM G. SCHULTZ, *Appellees.*	

APPELLANT'S PETITION FOR A REHEARING.

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To the Ninth Circuit Court of Appeals and to the Honorable Curtis D. Wilbur, Clifton Mathews, and Albert Lee Stephens, Judges thereof:

Comes now W. S. Swank, the Appellant in the above entitled cause, and presents this his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

That this court has jurisdiction of this case because in the Opening Brief, the second question was:

> "Whether the American Medical Association and its subsidiaries can set the standard of qualifications for the practice of medicine",

which involved the Constitutionality of the Laws of the State of Arizona regarding the Practice of Medicine, Arizona Code Annotated 67-1101 to 67-1109.

II.

That Appellant in the second amended complaint filed herein alleged as follows:

"IV.

That said laws of 1936, in substance, provide that anyone, to qualify for examination to practice medicine and surgery, 'shall file with the board, at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character and a diploma issued by some legally charted school of medicine, the requirements of which shall have been, at the time of granting such diploma not less than those prescribed by the Association of American Medical Colleges for the year.' In this regard, plaintiff avers that the Association of American Medical Colleges is not a legal or proper authority to prescribe the qualifications for the medical profession or for the practitioners of medicine and surgery, and, therefore, such requirements and prescribed qualifications are unconstitutional and void as a delegation of legislative power; that the law makers of Arizona alone may prescribe the qualifications for the practice of medicine and surgery within the State of Arizona.

That the requirements for and during the year 1927, by the aforementioned American Academy of Medicine and Surgery, were equal to or not less than those of the Association of American Medical Colleges for and during that year, to the

actual knowledge of the defendants and each of them individually.

V.

That the Association of American Medical Colleges is sponsored by the American Medical Association, of which the defendants are members, except the defendant, Charles C. Bradbury; that the defendnats by reason of their said membership and its rules and prescriptions by its legislative committee did, and do, in fact prescribe the qualifications for applicants for license to practice medicine and surgery in the State of Arizona, contrary (39) to law, arbitrarily, unlawfully and discriminatory to qualified applicants, including the plaintiff.

That both the American Medical Association and the Association of American Medical Colleges are monopolistic and act in violation of Section 2, Title 15 of the Laws of the United States, and in violation of Section 74-101 of the laws of the State of Arizona; both of which said provisions of law prohibit trusts and monopolies.

VI.

That the plaintiff has heretofore offered and tendered for filing, satisfactory testimonials as to his good moral character and has tendered his diploma aforementioned, and the required fee provided by law, and has, in fact, complied with all legal requirements prescribed by the laws of Arizona; that the defendants and each of them individually, all of whom are licensed physicians and surgeons except the defendant Charles C. Bradbury, who is a licensed osteopathic physician, did, wilfully and maliciously, and well know-

sand Dollars ($50,000.00) and exemplary damages in the sum of Fifty Thousand Dollars ($50,-000.00)."

III.

That appellant in the Opening Brief, pages 37 to 40 states as follows:

"Plaintiff further alleges that the Association of American Medical Colleges is fostered by the American Medical Association; that both the American Medical Association and the American Association of Medical Colleges are monopolistic and act according, in violation of Sec. 2. Title 15 of the United States Code Annotated and in violation of Sec. 74-101 of the Laws of the State of Arizona; that both of said sections prohibit monopolies and said provisions providing that the Association of American Medical Colleges shall make and require such qualifications for the practice of Medicine are contrary to the Constitution and laws of the United States and the Constitution and laws of the State of Arizona.

While the Supreme Court of the State of Arizona has not passed on the constitutionality of the present Basic Science Law, in Bueham et al. v. Bechtel, 114 Pac. 2d 227, they have stated as follows:

(1) Only the legislature can create the standard and provide the reasonable limits of the poser of admitting and excluding persons from a business, trade or profession, State v. Harris, supra. It may be granted that the legislature has fixed the standard as competency, ability and integrity and that such standard is a sufficient and a proper one for a person desir-

ing to practice photography, yet it is apparent the legislature used language the board might construe as giving it the right to disregard such standard and set up an arbitrary standard of its own. The board might regard too much or too strong competition as "sufficient reason" for not licensing a person, or the applicant's age, sex, color or religion might disqualify him. We cannot say the standard fixed by the legislature is not a sufficient guide to the Board of Examiners, or that the Board would arbitrarily disregard such standard and refuse a license to one who qualified under the act, but we do call attention to the fact that the Board may use its power to make it very difficult for worthy persons to secure a license to practice photography.

In connection with the free use of the police power over certain trades and occupations, for the purpose of securing to those engaged therein rights and powers of an exclusive and monopolistic character.

Statutes regulating trades and occupations by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control the personnel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations, occupations ranging from the learned professions to the ordinary trades, U. N. C. Law Review, Vol. p. 1.

'No independent administration supervision is provided over these organizations. No report of their activities is made to any responsible branch of government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

The Stage of internal protest has been reached. In marginal cases controversies in the courts have arisen as to whether the organization has captured a sufficient quatum of public purpose to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to a private group to be used in narrowing the field of competition, or in aid of exploitation by creating remunerative positions in administration. Roach v. Durham, 204 N. C. 587, 169 S. E. 149; State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366. Without the aid of the statute these groups would be mere trade guilds, or voluntary business associations; with it they become State agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved by the device of securing a majority membership on the administrative boards or commissions, and in aid of this the power of the State is heavily invoked by way of prosecution in the criminal courts of those who are unable to secure the approval of the Board and obtain license to engage in the occupation.

It is this power of exclusion of fellow workers in the same field that gives to the subject its

social significance and invites our most serious consideration of the constitutional guarantees of personal liberty and individual right called to our attention.'

Therefore, the appellees in committing the acts complained of were not acting as constituted officials of the State, which appellant contends, prohibits the Attorney General from representing the appellees in this action."

Again beginning on page 55 to 60 in the Opening Brief we state as follows:

"Council for appellees will contend that the Fourteenth Amendment to the Constitution does not apply, that this is a prohibition against the State; and that if it does, Cecil A. Edwards, as Assistant Attorney General of the State of Arizona, has the right to appear as counsel for appellees.

This the appellant denies, because the law which the appellees, through the American Medical Association, have obtained, providing that only graduates of the legally chartered schools of medicine, the requirements of which shall have been at the time of granting the diploma not less than those prescribed by the Association of American Medical Colleges, is unconstitutional.

What rights have the Association of American Medical Colleges to say that their method of treating the human ills is the only way? It is a well recognized fact that medicine is not an exact science. In a recent Brief before the New Jersey Legislature opposing a similar law it was stated that in Johns-Hopkins Hospital their diagnoses were fifty per cent wrong, that in Bellview Hos-

pital in New York their diagnoses were sixty per cent wrong, and similar facts regarding the greatest hospital institutions of the country.

We for the last decade in our government have been drifting toward the crisis which we face today, of whether we shall have government by constituted authority or government by organization. The medical and legal professions have in the past been looked up to for guidance through any crisis. For us to seek special legislation in any way providing for governing problems we face of organizations letting our Armed Forces down. Unless stopped by the courts by decreeing that the legislature only can set the standards of the professions, we face disaster. Justice Ross of the Arizona Supreme Court, in Bueham et al. v. Bechtel et al, supra, has painted out to the courts the law that can save our constitution in this issue as follows:

'Only the legislature can create the standard and provide reasonable limits of the power admitting and excluding persons from a business, trade or profession.'

The Court further said in that 'Legislature tending to promote monopolies in private business is to be condemned.'

At the time this decision was rendered, the North Carolina Supreme Court, in the case of State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366, had upheld a statute licensing photographers, which caused Frank Hanfit, Professor of Law, and Gay Nathaniel Hamrick, student, of the University of North Carolina, to write a thesis and brief on licensing of the professions, and Chief Justice Ross, of the Supreme

Court of Arizona in writing the decision in Buehman et al, v. Bechtel et al, supra, made the following comments in regard to the delegation of power to set the standards of practice to other than the legislature;

'Statutes regulating trades and occupations by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control the personel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that Charter may be listed which not only regulate but organize into autonomous corporations, occupations ranging from the learned professions to the ordinary trades. U.N.C. Law Review, Vol. 17, p. 1.

No independant administrative is provided over these organizations. No report of their activities is made to any resposible branch of government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

The stage of internal protest has been reached, in marginal cases controversies in the courts have arisen as to whether the organization has captured a sufficient quatum of public purpose, to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to private groups to be used in narrowing the field of competition, or in aid of exploitation by creating renumerative positions in

Certificate of Counsel.

I, C. H. Richeson, counsel for the above named appellant, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Dated, Phoenix, Arizona,
December 8, 1943.

C. H. Richeson,
Attorney for Appellant and Petitioner.